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IN THE

Supreme Court of the United States

October Term, 1954

No. 666

RECORD PUBLISHING COMPANY OF ERIE,
Petitioner and Appellant Below

vs.

DAVID RALPH HERTZ and SAMUEL A. HORVITZ,
Appellees Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Record Publishing Company of Erie, appellant in the court below, respectfully petitions your Honorable Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit in the case of David Ralph Hertz and Samuel A. Horvitz, appellees, vs. Record Publishing Company of Erie, appellant, No. 11,327, in which the said United States Court of Appeals affirmed the judgment of

the United States District Court for the Western District of Pennsylvania, directing the defendant Pennsylvania corporation, to transfer to appellee, Samuel A. Horvitz (plaintiff below), Certificate No. 87, representing 150 shares of its common stock previously standing in the name of appellee, David Ralph Hertz (plaintiff below).

Your petitioner respectfully shows:

(a) To the best of petitioner's knowledge, the opinions in the courts below are not reported. The final opinion of the United States District Court for the Western District of Pennsylvania is appended hereto and marked Exhibit "A". The opinion of the United States Court of Appeals for the Third Circuit is appended hereto and marked Exhibit "B".

(b) A statement of the grounds on which the jurisdiction of this court is invoked are as follows:

(i) The judgment or decree sought to be reviewed was entered on January 5, 1955.

(ii) A petition for rehearing filed in this case was denied by the court on February 2, 1955. Pursuant to the rules of the court below, on petition for stay of mandate, the mandate was stayed until March 9, 1955, for the purpose of applying to this court for a writ of certiorari.

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari is 28 U.S.C.A. 1254 (Act June 25, 1948 c. 646, 62 Stat. 944).

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(c) The questions presented for review are as follows:

(i) In a diversity case, does a Federal District Court have jurisdiction to issue an order in the nature of a writ of mandamus to compel a Pennsylvania corporation to transfer stock upon its books?

(ii) Where a state court has previously found that a proposed transferor of stock in a Pennsylvania corporation is not the sole and absolute owner of such stock in his own right, should a Federal Court order transfer of such stock on assignment executed by such transferor to a third person?

(d) The constitutional provisions, treaties, statutes, ordinances or regulations which the case involves are as follows:

(i) Rule 81(b) of the Federal Rules of Civil Procedure:

"(b) Scire Facias and Mandamus. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

(ii) Rule 82 of the Federal Rules of Civil Procedure:

"Rule 82. Jurisdiction and Venue Unaffected.

"These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

Provisions Involved

(iii) 28 U.S.C.A. 1651:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. June 25, 1948 c. 646, 62 Stat. 944, amended May 24, 1949, c. 139, Sec. 90, 63 Stat. 102."

(iv) Act of Assembly, Commonwealth of Pennsylvania, June 8, 1893, P.L. 345, Sec. 1 as amended (12 Purdon's Pa. Statutes 1911)

"Sec. 1911. To whom writ may be issued.

The several courts of common pleas shall, within their respective counties, have the power to issue writs of mandamus to all officers and magistrates elected or appointed in or for the respective county, or in or for any township, district or place within such county, or in or for any township, district, or place within such county, and to all corporations being or having their chief place of business within such county and to any corporation doing business or having its property, in whole or in part, within the county: Provided, The relief, act, duty, matter, or thing, the performance of which is sought, should be given or performed within such county; and the court of common pleas of the county in which the seat of government is or may be located shall have the power, and it shall be required, to issue the writ of mandamus to all of-

ficers of the executive department of the Commonwealth as defined in Article IV, section one, of the Constitution, except the Governor; all other heads of administrative departments of the State government, except the Secretary of Banking; all independent administrative boards or commissions of the State government and all departmental administrative boards or commissions of the State government. 1893, June 8, P.L. 345, Sec. 1; 1899, April 29, P.L. 84, Sec. 1; 1903, March 19, P.L. 32, Sec. 1; 1913, June 19, P.L. 526, Sec. 1; 1925, May 13, P.L. 664, Sec. 1."

(c) Statement of the case.

This suit was brought in the District Court of the United States for the Western District of Pennsylvania by plaintiffs, David Ralph Hertz and Samuel A. Horvitz, citizens of the state of Ohio, against Record Publishing Company of Erie, a Pennsylvania business corporation, and hence a citizen of Pennsylvania, as a diversity case, wherein the matter in controversy was alleged to exceed $3000.00, between citizens of different states, pursuant to the provisions of 28 U.S.C.A. 1332 (June 25, 1948, c. 646, 62 Stat. 930). The complaint alleged (App. 8a) that the plaintiff Hertz, a citizen of Ohio, had acquired the ownership of 150 shares of the stock of Record Publishing Company of Erie, a Pennsylvania business corporation, and that he had sought to transfer the same to plaintiff, Horvitz, also a citizen of Ohio, and that the defendant corporation had refused to issue a new certificate in the name of Horvitz. The prayer of the complaint was for an appropriate order by the District Court directing and requiring the defendant to issue a certificate for such shares

in the name of Horvitz. The defendant's answer (App. 13a) alleged that plaintiff Hertz, was not the real owner of the 150 shares in question, and that the matters in question had previously been at issue between Hertz and the defendant, in the Court of Common Pleas of Erie County, Pennsylvania, in which it had been determined that Hertz was not the sole and absolute owner of the stock in question in his own right, but that court had not determined who was the real owner of such stock. It was further averred that the complaint did not state a cause of action upon which relief could be granted, and that other unknown persons were interested in, and the real owners of such stock.

After the pleadings defendant filed a suggestion of lack of jurisdiction (App. 39a) on the grounds that the suit was one in the nature of an action of mandamus, of which the District Court had no jurisdiction. Defendant further moved for judgment on the pleadings, and plaintiffs moved for summary judgment. Both motions were denied.

At the trial of the case, the plaintiff testified, over objection, that he was the sole and absolute owner of the shares of stock in question, and that no other person had an interest in the stock. Defendant offered in evidence an exemplification of the record in the Court of Common Pleas, wherein it was found that plaintiff, Hertz, was not the sole and absolute owner of this stock, and defendant's president, Lamb, further testified that they had refused to transfer the stock because of the state court decision to the effect that plaintiff was not the owner of the stock in question, and that he felt that plaintiff Horvitz's owner-

ship of stock in this corporation, which publlishes a newspaper in Erie, and is connected with televisiion and radio stations in Erie, would jeopardize the corpcoration.

The District Court entered an order con March 25, 1954 (App. 136a) directing the defendant tto cancel the stock certificate standing in the name of Herttz, and in lieu thereof to cause to be issued to plaintiff, Horvitz, a new certificate representing these shares.

Thereafter, an appeal was duly taken tco the United States Court of Appeals for the Third Circuit, which on January 5, 1955, entered an order affirming the order of the District Court. Thereafter, a petition for rehearing was filed and denied by order dated February 2, 1955. Petitioner contended in the Court of Appeals that this suit was in the nature of a suit for a writ of mandamus in a diversity case, of which the United States District Court had no jurisdiction, and further that the order of the Court of Common Pleas of Erie County, Pennsylvania, determining that the transferor, Hertz, was not the sole and absolute owner of the stock in question in hiis own right, was res judicata in Federal Court, and prevented the issue of an order directing the transfer of the stock until the title thereto had been finally determined.

ARGUMENT

It is contended that the writ of certiorari should be granted in this case for the following reasons:

(i) The Court of Appeals in this case has rendered a decision in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Hurt vs. Cotton States Fertilizer Co.*, 159 F. (2d) 52 (C.C.A. 5th 1947);

(ii) The United States Court of Appeals has in this case decided an important federal question, viz., the power of a United States District Court to issue a writ of mandamus in conflict with the applicable decisions of this court, viz., *McIntire vs. Wood*, 7 Cranch 504, *Rosenbaum vs. Baur*, 120 U. S. 450, 7 S. Ct. 633, 30 L. Ed. 743, *Smith vs. Bourbon County*, 127 U. S. 105. In the alternative, it is submitted that there is raised in this case an important question of federal law, viz., the right of a Federal Court to issue an order in the nature of a writ of mandamus to compel a business corporation to transfer shares of its stock upon its books, which if the above decisions are not applicable, has not been, but should be, settled by this court.

(iii) The Court of Appeals has decided an important question of federal and state law, viz., the applicability of the doctrine of res judicata to judgments affecting the title to property in such a way as is in conflict with the applicable decisions of the Supreme Court of Pennsylvania, viz., *Hochman vs. Mortgage Finance Corp.*, 289 Pa.

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260, 137 A. 252, *Dougherty vs. Lehigh Coal and Navigation Co.*, 202 Pa. 637, 52 A. 18, and the applicable decisions of this court, viz., *U. S. vs. Munsingwear, Inc.*, 340 U. S. 36, 71 S. Ct. 104, 95 L. Ed.

I. THE UNITED STATES DISTRICT COURT DID NOT HAVE JURISDICTION OF THIS SUIT, A DIVERSITY CASE, FOR WHAT WAS SUBSTANTIALLY A WRIT OF MANDAMUS TO COMPEL THE TRANSFER OF STOCK BY A PENNSYLVANIA BUSINESS CORPORATION

The petitioner in this case raised in the lower court a question of jurisdiction over the subject matter, contending that this action to compel the transfer of corporate stock was in the nature of an original action of mandamus, of which the Federal Courts had no jurisdiction. The prayer of the complaint was as follows (App. 10a):

> "Wherefore, plaintiffs pray for appropriate orders by this court directing and requiring the defendant corporation to issue its certificate for 150 shares of its common stock in the name of the plaintiff Samuel A. Horvitz, and for such other orders, judgments and relief as may come to be suitable and proper in the premises, including judgment for plaintiffs' reasonable expenses herein, and plaintiffs' costs of suit."

We submit that if there is anything well settled in the law, it is that in the absence of specific statutory authority, a United States District Court, other than the federal courts of the District of Columbia, which are courts of

general jurisdiction, has no jurisdiction whatsoever to issue an original writ of mandamus. They do have jurisdiction to issue an auxiliary writ of mandamus, that is, a mandamus in the nature of an execution on a judgment already entered by the court, such as one to compel a municipality to levy a tax to pay the judgment. It is apparent from the pleadings in this case that the relief which plaintiff seeks is an order to transfer stock on the books of the corporation, which must be an original writ of mandamus.

In *Cyclopedia of Federal Procedure*, Sec. 7060, it is stated,

> "It is well settled that federal district courts have no original jurisdiction in mandamus proceedings***"
>
> "The only original jurisdiction in district courts of the United States in mandamus actions is that conferred by special federal statutes as noted hereafter. The federal grant of jurisdiction to the district courts generally over original suits 'at common law or at equity' does not extend to original actions of mandamus * * *"
>
> "However, district courts have jurisdiction of a mandamus proceeding where the relief sought is an aid of their jurisdiction in a case already pending wherein jurisdiction was acquired by other means and by other process * * *"
>
> "Oftentimes the desired result can be obtained in the local district court by asking for a mandatory injunction, but a prayer for a mandatory injunction may be in effect one for the issuance of mandamus to compel an officer to act within the rule that what the

court is without power to do directly cannot be done indirectly."

See also: *American Jurisprudence, Mandamus,* Sec. 17.

The rule that the federal courts have no jurisdiction to issue an original writ of mandamus stems from the early case of *McIntire vs. Wood,* 7 Cranch 504 (1813). The court there pointed out that Congress had delegated only specific powers to the federal courts. The right to issue a writ of mandamus to the register of a federal land office to grant certificates of purchase was not one of them.

We find this doctrine reiterated down through the years by the Supreme Court and by various Circuit Courts of Appeals and District Courts. It was specifically held in a diversity case that a United States court has no jurisdiction to issue a writ of mandamus, and that the All Writs Act does not add to the jurisdiction of the courts, but only facilitates the courts in exercise of jurisdiction already bestowed. *Rosenbaum vs. Baur,* 120 U. S. 450, 7 S. Ct. 633, 30 L. Ed. 743. See also: *Bath County vs. Amy,* 13 Wall. 244 (The Rosenbaum case was a diversity case involving a mandamus to state officers). It was later held that a district court had no jurisdiction to issue a writ of mandamus in a case arising under the Interstate Commerce Act, and had no jurisdiction to issue the writ unless Congress has clearly conferred the power. *Knapp vs. Lake Shore Railway Co.,* 197 U. S. 536. In *Covington Bridge Co. vs. Hager,* 203 U. S. 109, we had an action for mandamus against the auditor of public accounts of Kentucky, to compel him to pay a bill. The court said:

"We are of the opinion that the court below had no jurisdiction of this action. It has been too fre-

quently decided in this court to require the citation of cases that the Circuit Courts of the United States have no jurisdiction in original cases of mandamus and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process. * * * We deem it settled beyond controversy until Congress shall otherwise provide, that the Circuit Courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ; and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States."

At one time it was thought that this rule could be evaded by plaintiff styling his case a suit for a mandatory injunction which is what the plaintiffs are arguing in the case at bar, but this ingenious device was long ago scotched by this court in *Smith vs. Bourbon County*, 127 U. S. 105. One of the objects of relief was to compel County Commissioners to sign a bond issue. The United States Supreme Court held that this was in reality a suit in mandamus no matter what it was called, and that it would not lie in federal court. The court said:

> " * * * that lack of jurisdiction cannot be supplied by converting the proceeding into a bill in equity.—The objection is one of substance and not merely of form. It cannot be waived, and it cannot be ignored."

That the All Writs Act (formerly 28 U.S C.A. 377, now 28 U.S.C.A. 1651) does not enable the court to issue a writ

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of mandamus has been pointed out in *Rosenbaum vs. Baur,* 120 U. S. 450, 7 S. Ct. 633, 30 L. Ed. 743, and *Insular Police Commissioner vs. Lopez,* 160 F. (2d) 673 (C.C.A. 1st 1947). It only enables the court to issue writs in aid of jurisdiction otherwise acquired.

The limitations on the issuance of writ of mandamus by the United States District Court apply to suits for mandamus against private corporations. *Stevenson vs. Holstein Friesian Assn.,* 30 Fed. (2d) 625 (C.C.A. 2d 1929), *Hurt vs. Cotton States Fertilizer Co.,* 159 F (2d) 52 (C.C.A. 5th 1947).

In the Hurt case there was a stockholder's action in which it was sought inter alia to compel the corporation to transfer certain stock to plaintiff's name. The court said:

> "Insofar as the suit could be considered not as a stockholder's suit, but as a suit brought by plaintiff individually to mandamus the company to transfer the shares into his name, the District Judge was right in holding the jurisdictional amount was lacking and also that a federal district court had no jurisdiction over an original proceeding seeking relief by mandamus."

It is readily apparent that the decision of the Court of Appeals for the Third Circuit in the case at bar is in conflict with that of the Fifth Circuit in the Hurt case. The result is that the law on jurisdiction of a United States District Court to require transfer of stock in a state corporation has been thrown into confusion by the decision in the case at bar and this confusion can only be ended by a decision of this court.

Rule 81(b) of the Federal Rules of Civil Procedure does not help the appellee, because it merely states that

"relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

Rule 82 provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

From this it appears that these rules were not intended to extend the jurisdiction of the Federal Courts in mandamus, but merely to regulate the manner of exercising what jurisdiction was already vested in them. See *Youngblood vs. U. S.*, 141 F. (2d) 912 (C.C.A. 6th 1944).

The Pennsylvania courts have uniformly held that the remedy to compel transfer of stock is by mandamus. See *Sproul vs. Standard Glass Co.*, 201 Pa. 103, 50 A. 1003, *Deal vs. Erie Coal and Coke Co.*, 244 Pa. 622, 90 A. 915, *Evans vs. Evans and Co.*, 284 Pa. 126, 130 A. 313, *Hanna vs. Chester Times*, 310 Pa. 583, 166 A. 243, *Citizens National Bank vs. Irwin Bldg. & Loan Assn.*, 316 Pa. 536, 175 A. 399.

Appellees (plaintiffs below) have argued that a suit in equity will lie where the title is in dispute. This is true where there is a dispute between stockholders of a corporation and parties claiming to be stockholders (Act of Assembly of Pennsylvania May 4, 1893, P.L. 29, 17 Purdon's Pa. Statutes 285), but that is not this case. This suit was simply a suit by a shareholder to compel a corporation to transfer shares of stock, and was not a suit to try title to the stock. Petitioner by alleging in its answer that appellee, Hertz was not the real owner of this stock was

merely raising the standard defense to a writ of mandamus to transfer stock under Pennsylvania law, that the title was in doubt, which, as will be pointed out later, has always been a good defense to such an action. This did not turn the case into a suit to try title. All potential claimants who might have an interest in this stock were not made parties to this suit, and hence any judgment entered herein would not be conclusive on them, even if some of them may have disclaimed their interest. This has been specifically so held by the Supreme Court of Pennsylvania in *Leff vs. N. Kaufman's, Inc.*, 342 Pa. 342 at 350, 20 A. (2d) 786, where the court pointed out that the title could only be determined in an adversary proceeding wherein all potential claimants were parties. This was not a case of that type. There was no prayer in this complaint to have the court determine the title to the stock, nor were potential owners made parties. Hence it is submitted it was nothing more than a pure and simple suit for a writ of mandamus.

This court has stated in *Huddleston vs. Dwyer*, 322 U. S. 232, 64 S. Ct. 1015, L. Ed. , that state law is controlling as to both the substantive and procedural rights of the parties in mandamus (that case was an action of ancillary mandamus to collect a judgment against a municipality). It is submitted the question as to whether transfer of corporate stock is to be compelled by a writ of mandamus is a matter of substantive law, as to which the Pennsylvania state law should control, under *Erie Railroad Co. vs. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. Since this involves the issuance of a writ in the name of a sovereign, it should be issued by the court owing allegiance to the sovereign as appears from the history of the writ in *Shortt on Mandamus*, p. 224, *Rex vs. Barker*,

1 W. Bl. 352, the writ being an ancient prerogative writ and not at all an ordinary action in law or in equity.

From the above it appears that the decision in this case is in conflict with that of the Fifth Circuit in the Hurt case which adhered to the above cited decisions of this court and refused to issue a writ to compel transfer of stock in a state corporation. The decision is further in conflict with the cited decisions of this court, or to say the least, presents a question which should be settled by this court. These are important considerations which demonstrate the desirability of review of this decision by certiorari.

II. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF THE DOCTRINE OF RES JUDICATA, AND THE DECISION IN QUESTION HAS THROWN THE LAW ON THIS SUBJECT INTO CONFUSION

As has been pointed out, appellee Hertz had previously brought suit against the petitioner in the Court of Common Pleas of Erie County, Pennsylvania, and in that suit it had been determined by a jury's verdict, affirmed by the court en banc and final judgment entered upon the verdict that Hertz was "not the sole and absolute owner of this stock in his own right" (App. 114a). The jury's verdict was entered January 21, 1948. The decision of the court en banc sustaining the jury's verdict was entered June 25, 1948, and final judgment was entered March 18, 1954 (App. 129a). Petitioner in its answer in the lower court and before the Court of Appeals, pleaded that the judgment of the state court was res judicata on the ques-

tion of ownership, and that plaintiff Hertz and his transferee, Horvitz (who was not a bona fide purchaser, having paid nothing for the stock, but only having entered into an agreement to pay when the stock was transferred) were barred by this judgment from bringing a suit to compel the transfer of the stock, because it had been conclusively determined that Hertz was not the owner. The Court of Appeals answered this argument as follows:

> "Assuming that the specific determinations made by the jury are res judicata between Hertz and the corporation, the only relevant determination was that on January 21, 1948, Hertz was not the sole owner of the stock in his own right. That which the district court decided was that Hertz was the sole owner of the stock on June 1, 1949. These two determinations are not inconsistent. The issue decided in the state court was not the same issue decided in the district court, and thus the principles of res judicata are not applicable.
>
> The corporation points out that under Pennsylvania law there is a presumption that a status or relationship once shown to exist is presumed to continue in the absence of evidence to the contrary. This presumption of law, however, disappears when contrary evidence of the fact in issue is introduced. See Morse Boulger Destructor Co. v. Arnoni, 376 Pa. 57, 101 A. 2d 705 (1954); 9 Wigmore Evidence Sec. 2491 (3d ed. 1940). In the present case, the evidence presented was sufficient to warrant a finding that Hertz was the sole owner of the stock on June 1, 1949, and on that date transferred that ownership to Horvitz."

In this it is submitted that the Court of Appeals fell into grievous error, and that the result of this decision is to enunciate a strange and novel doctrine, viz., that a judgment of a court of competent jurisdiction that a certain person is not the owner of certain property, be it real or personal, is only res judicata as of the date of the jury's verdict, and that it is entirely competent for the defeated party, who has been found not to be the owner, to bring another suit the next day in another federal or state court and try the same issue all over again, presenting testimony to the effect that the finding in the first case was wrong, without presenting any evidence as to change of circumstances since the date of the first finding, and have the first finding entirely ignored by the second court. If this is the law, then the doctrine of res judicata has practically no application to determinations of ownership of property, and as a matter of fact we are now worse off with respect to judgments in ejectment as to real property than we were at common law, where it was originally held that you had to have two verdicts in ejectment to be res judicata.

It is submitted that this decision of the Court of Appeals is in serious conflict with all the authorities, both in the federal and state courts throughout this country, and in conflict with the applicable decisions of this court and the Supreme Court of Pennsylvania.

In *U. S. vs. Munsingwear, Inc.,* 340 U. S. 136, 71 S. Ct. 104, 95 L. Ed. the court cited what it termed, "the classic statement of the rule of res judicata" in *Southern Pacific R. Co. vs. United States,* 168 U. S. 1, 18 S. Ct. 18, 42 L. Ed. 355, as:

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"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a general ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

This pronouncement is in accord with the law generally throughout the United States as stated in *American Jurisprudence, Judgments,* Sec. 178, where it is said:

"It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action and were there admitted or judicially determined are conclusively settled by a judgment rendered therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issues may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim or demand as the earlier action. In such cases it is immaterial that the two actions are based on different grounds or tried on different theories or instituted for different purposes and seek different relief."

The Supreme Court of Pennsylvania has adopted a similar attitude with respect to the doctrine of res judicata as set forth in the case of *Hochman vs. Mortgage Finance Corp.*, 289 Pa. 260, 137 A. 252:

> "It is a general principle of public policy, making for the general welfare, for the certainty of individual rights, and for the dignity and respect of judicial proceedings, that the doctrine of res adjudicata should be supported, maintained and applied in proper cases. Nor should its application be restricted by technical requirements, but a broad view should be taken of the subject, having always in mind the actual purpose to be attained. The rule should not be defeated by minor differences of form, parties or allegations, when these are contrived only to obscure the real purpose,—a second trial on the same cause between the same parties. The thing which the court will consider is whether the ultimate and controlling issues have been decided in a proper proceeding in which the present parties actually had an opportunity to appear and assert their rights. If this be the fact, then the matter ought not to be litigated again, nor should the parties by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule. This is a universal rule and is well stated by our present Chief Justice in State Hospital v. Con. Water Co., 267 Pa. 29, 37. The requirements for application of the rule are that there be an identity of parties and of subject-matter in the two actions. The first of these requirements being present, all issues that were actually adjudicated in the former action are concluded (Bower's Est., 240 Pa. 388; First

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Nat. Bank of Wrightsville v. Dissinger, 266 Pa. 349); and if the whole cause of action in the second case is the same as in the first, not only the issues actually adjudicated in the first proceeding, but also those which might have been raised and passed upon are concluded. If, then, the issues in the present case could have entered into the determination of the first case, they should have been presented; and if they were omitted for any cause, the judgment or decree entered thereon is conclusive between the parties or their privies. See Morrett v. Fire Assn., 265 Pa. 9, 12 and 13."

In 50 *C. J. S.* 92, it is said:

"The estoppel of a judgment extends only to the facts and conditions as they were *at the time the judgment was rendered*, and to the legal rights and relations of the parties as fixed by the facts so determined; *and when new facts or conditions intervene* before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and hence the former judgment cannot be pleaded in bar to the subsequent action." (italics ours)

See e.g. *Fisher Bldg. Permit Case*, 355 Pa. 364, 49 A. (2d) 626 (later acquisition of ownership of property after former decision).

A judgment as to title to personal property is conclusive in all further litigation between the same parties and their privies, but not as to "an indeperdent right or title acquired after the rendition of such judgment", 50 *C.J.S.* 227.

Argument

It appears to be clear from all the cases that an altered situation must have been created by events occurring *subsequent to the rendition of the prior judgment,* in order to escape the conclusiveness of the prior holding that plaintiff's title was not good. See *Restatement of Judgments,* Sec. 72, where it is said:

> "The decision of a court on a question of fact or law involving an interest in property is not conclusive in a subsequent action between the same parties with reference to other property acquired by one of the parties *subsequent to the judgment.*"

The significant event in the state court was the entry of judgment. See *Restatement of Judgments,* Sec. 41.

It will be noted also that the Court of Appeals treated the date as of which res judicata was determined as the date of the jury verdict on January 21, 1948, and stated that this did not indicate that Hertz was not the sole owner of the stock in his own right on June 1, 1949, when demand for transfer of this stock was made. It has been pointed out January 21, 1948 is not the date to use, since the decision of the court en banc was made on June 25, 1948 and the final judgment was entered March 18, 1954. It is the final judgment which counts, not the jury verdict. See *Dougherty vs. Lehigh Coal and Navigation Co.,* 202 Pa. 635, 52 A. 18, *Restatement of Judgments,* Sec. 41.

At the trial in the District Court Hertz was permitted to testify over objection that he was the sole and absolute owner of this stock, and had been at the time of the trial in the state court. It is submitted the action of the lower court in permitting this testimony was error, and Hertz should not have been permitted to testify in contradiction

of the verdict and judgment of the state court. There was no evidence offered of any subsequent acquisition of title or subsequent proceedings to clear up the title, or any other change in circumstances which might militate against continued application of the principles of res judicata arising out of the state court judgment.

The fact that there had been a finding that Hertz was not the sole and absolute owner of this stock would, in the Pennsylvania courts, have prevented the issuance of any order compelling its transfer until the title had been cleared up and under *Erie Railroad Co. vs. Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188. This should have prevented the issuance of such an order in Federal Court.

The law of Pennsylvania as laid down by the decisions of the Pennsylvania Supreme Court is clear to the effect that where plaintiff's title is not clear the corporation cannot be compelled to transfer stock until the title has been cleared up. *Soltz vs. Exhibitors' Service Co.*, 334 Pa. 211, 5 A. (2d) 899, *Leff vs. N. Kaufman's, Inc.*, 342 Pa. 342, 20 A. (2d) 786, *Livezey vs. Northern Pacific Railroad Co.*, 157 Pa. 75, 27 A. 379.

For these reasons it is submitted that the decision of the Court of Appeals in this case will, if allowed to stand, throw the law of res judicata into confusion and the result will be to require a Pennsylvania business corporation to transfer stock by virtue of an order of a Federal Court, when a Pennsylvania state court under similar circumstances would not order such transfer.

There is submitted herewith, in compliance with Rule 21(3), a copy of the appendix filed in the court below (it

being the only appendix filed therein) together with all proceedings in the court below duly certified.

Wherefore, your petitioner respectfully prays your Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit, to the end that the errors aforesaid may be corrected by this court.

And your petitioner will ever pray, etc.

WILLIAM W. KNOX
Attorney for Petitioner

1102 Palace Hardware Building
Erie, Pennsylvania

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EXHIBIT A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 149—Erie

David Ralph Hertz and Samuel A. Horvitz,
Plaintiffs

vs.

Record Publishing Company of Erie,
Defendant

ADJUDICATION

Plaintiff David Ralph Hertz, in the year 1946, acquired of record Certificate No. 87 for 150 shares of the common stock of defendant, Record Publishing Company of Erie. The complaint alleges that on June 1, 1949 plaintiff David Ralph Hertz agreed to sell said shares to the plaintiff, Samuel A. Horvitz, for the sum of $15,000.00. It is further alleged that as part of the consideration plaintiff Hertz agreed to obtain the transfer of said shares of stock upon the books of the defendant corporation to plaintiff Horvitz and to obtain for and deliver to Horvitz a new certificate. It is alleged that on or about June 23,

1949 the certificate was duly presented to the defendant corporation for transfer as aforesaid, but that the corporation rejected the tender and refused to issue a new certificate as demanded. Shortly thereafter Hertz sent the certificate by registered mail to the corporation and once more demanded that the defendant issue in exchange therefor the new certificate in the name of Horvitz. Defendant again refused the transfer, but retained the certificate. Plaintiffs pray for appropriate Orders of this Court directing and requiring the defendant corporation to issue its certificate for 150 shares of said stock in the name of plaintiff Samuel A. Horvitz and for such other and further relief, etc.

In defense of the relief prayed for by the plaintiffs, the defendant says, first, that the United States District Courts have no jurisdiction as the relief prayed for is in the nature of mandamus, and second, that the plaintiff David Ralph Hertz is not the real owner of the shares of stock, and in this connection it is averred that some person or persons unknown to the defendant are the real owners or beneficial owners thereof.

The late Judge Owen M. Burns of this Court ruled against defendant on the question of jurisdiction. His Opinion and Order on this phase of the case was filed June 6, 1952. This Court therefore will not re-examine the proposition decided by Judge Burns except to say that the pleadings present a diversity case in which the issue is the ownership of the shares of stock represented by the certificate and as ownership must be decided any theory of mandamus is secondary to the main issue of ownership.

Defendant refers to the litigation in the Court of Common Pleas of Erie County, Pennsylvania, No. 390 February Term, 1947. In that case David Ralph Hertz alone was plaintiff. He had sought to inspect defendant's books. Defendant denied that Hertz was the real party in interest and averred a covinous arrangement between him and Samuel A. Horvitz. To enforce inspection plaintiff there instituted an action in mandamus. A jury trial resulted in a verdict for defendant. In that case, in response to an interrogatory, the jury merely found that the defendant David Ralph Hertz was not the sole and absolute owner of the stock in his own right. As this Court understands it, therefore, the controversy as to who is the owner of the 150 shares of stock was not decided in the Common Pleas Court case. At this point it is well to note the Opinion and Order that Judge Burns entered June 6, 1952 on plaintiff's Motion for Summary Judgment and on defendant's Motion for Judgment on the Pleadings, both of which Motions he denied.

With respect to the issue of ownership Judge Burns said:

> "In view of the specific jury finding in the Court of Common Pleas of Erie County, Pennsylvania, that Hertz is not the sole and absolute owner of the stock in his own right, I believe it is not unreasonable under the circumstances for defendant corporation to require plaintiffs to prove the ownership of the stock before the registration is transferred."

With the foregoing as background, the case came on for trial by this Court. At the trial plaintiff Hertz testified. He stated that at the time he sought to transfer the

shares to Horvitz, he alone was the sole and real owner. The evidence of this witness stands uncontradicted except as to the Common Pleas finding hereinbefore referred to. Defendant offered no evidence as to ownership in anyone else. In the Common Pleas case, the defendant sought to show that Horvitz and possibly one Samuel T. Haas, an attorney in Cleveland, were involved with plaintiff Hertz in ownership of the stock. That case was commenced on January 13, 1947. Ownership of the stock was at issue there as of the time the inspection of the books was sought. Ownership of the stock is involved here as of the time the transfer was demanded. The latter demand was made first June 23, 1949, and again shortly thereafter. The ownership of the stock as of the time the inspection was desired is unimportant on the issue here unless ownership in the same person was continuous to the time of the requested transfer. The complaint in the present case was filed September 26, 1950. In the Common Pleas case defendant was apprehen ive that Horvitz had an interest in the stock at the time inspection was refused. This matter has, of course, now been resolved as the evidence is that at the time of the demanded transfer Hertz had agreed to sell the stock to Horvitz. The evidence also is that at the same time Samuel T. Haas had no interest in the stock.

Plaintiffs have, therefore, complied with the suggestion of Judge Burns and have conclusively proved the ownership of the stock.

Findings of Fact and Conclusions of Law follow.

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Exhibit A—Opinion of District Court

FINDINGS OF FACT

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1. The plaintiffs, David Ralph Hertz and Samuel A. Horvitz, are citizens and residents of the State of Ohio; the defendant, Record Publishing Company of Erie, is a corporation organized and existing by virtue of the laws of the State of Pennsylvania and as such is a citizen and resident of the said State, with its principal office in the City of Erie in the State of Pennsylvania.

2. That on September 23, 1946 plaintiff David Ralph Hertz acquired ownership of 150 shares of the capital stock of the Record Publishing Company of Erie, which shares had a par value of One Hundred dollars each, and were represented by Certificate No. 87 issued by said corporation to plaintiff.

3. The plaintiff, Samuel A. Horvitz, and the plaintiff David Ralph Hertz, on or about the first day of June, 1949, agreed that the said David Ralph Hertz would sell, transfer, and assign, and the plaintiff Samuel A. Horvitz would purchase and accept the said shares of stock at an agreed purchase price of $15,000.00. As part of the consideration for the said purchase price, the said plaintiff David Ralph Hertz agreed to obtain the transfer of the said shares of stock upon the books of said corporation from the said David Ralph Hertz to the said Samuel A. Horvitz and to obtain for and deliver to the plaintiff Samuel A. Horvitz, a new certificate for the said shares by the said corporation certifying that the said Samuel A. Horvitz is the owner of the said shares.

4. This action is based on diversity of citizenship, involves $3000.00 exclusive of interest and costs. It is not a collusive suit brought to confer on this court jurisdiction which it otherwise would not have.

5. On or about the 23rd day of June, 1949, the plaintiff, David Ralph Hertz, by his duly authorized and acting attorney, one Samuel Y. Rossiter, tendered to the defendant corporation the said Certificate No. 87 duly assigned for transfer under date of June 1, 1949, to the said Samuel A. Horvitz, plaintiff herein, and demanded in exchange therefor a new certificate for 150 shares to be issued in the name of the said Samuel A. Horvitz.

6. The said corporation rejected the said tender and failed, omitted and refused to issue a new certificate as demanded.

7. Under date of July 28, 1950, the said plaintiff David Ralph Hertz deposited in the registered mail of the United States in an envelope properly stamped and addressed to the defendant corporation, the said Certificate No. 87 duly assigned by the said plaintiff to the said Samuel A. Horvitz as aforementioned and once more demanded that the defendant corporation issue in exchange therefor a new certificate in the name of the said Samuel A. Horvitz, plaintiff herein, for the said 150 shares. The said envelope was received by the defendant corporation on or about the 29th day of July, 1950.

8. The defendant, Record Publishing Company of Erie, has retained the said Certificate No. 87 but has failed, omitted, and refused to issue in exchange therefor, a new certificate in the name of Samuel A. Horvitz, plaintiff herein, as demanded as aforementioned.

Exhibit A—Opinion of District Court

CONCLUSIONS OF LAW

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1. That as plaintiffs David Ralph Hertz and Samuel A. Horvitz are citizens and residents of the State of Ohio, and defendant Record Publishing Company of Erie is a Pennsylvania corporation, and as the shares of stock in controversy are of the value of $15,000.00, this Court has jurisdiction because of diversity of citizenship.

2. That on June 1, 1949, David Ralph Hertz was the sole, absolute and real owner of 150 shares of stock of defendant corporation as represented by Certificate No. 87, and on said date he did sell, assign and transfer the same to the plaintiff Samuel A. Horvitz for a good and valuable consideration.

3. That on June 23, 1949 the plaintiff David Ralph Hertz was entitled to require the Record Publishing Company of Erie, being the defendant corporation, to transfer said Certificate No. 87 representing 150 shares of defendant's stock to Samuel A. Horvitz and to demand in exchange therefor a new certificate for 150 shares to be issued in the name of said Samuel A. Horvitz.

4. That the ownership of said 150 shares of stock represented by Certificate No. 87 having been found to be in plaintiff Samuel A. Horvitz as of June 23, 1949 and at all times thereafter, defendant is directed to transfer the registration upon its books and records, and an Order will be entered accordingly.

Exhibit A—Opinion of District Court

ORDER

Now, to-wit, this 25th day of March, 1954, upon due consideration, defendant Record Publishing Company of Erie, a corporation, is directed to cause to be cancelled Certificate No. 87 representing 150 shares of its common stock standing in the name of plaintiff David Ralph Hertz, and in lieu thereof defendant is directed to cause to be issued to plaintiff Samuel A. Horvitz a new certificate representing the aforesaid 150 shares of its common stock.

JOSEPH P. WILLSON
United States District Judge

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,327

David Ralph Hertz and Samuel A. Horvitz

vs.

Record Publishing Company of Erie,

Appellant

On Appeal from the Judgment of the United States District Court for the Western District of Pennsylvania

Argued October 8, 1954

Before McLaughlin, Staley and Hastie, Circuit Judges

OPINION OF THE COURT

[filed 1-5-55]

By Staley, Circuit Judge.

Plaintiffs, David Ralph Hertz and Samuel A. Horvitz, citizens of Ohio, brought an action in the United States

District Court for the Western District of Pennsylvania against the Record Publishing Company of Erie, a Pennsylvania corporation. Plaintiffs alleged that Hertz was the owner of 150 shares of defendant corporation's stock which he had agreed to sell to Horvitz and that the corporation had refused, after proper demand, to cancel Hertz's stock certificate and issue a new one to Horvitz.

The complaint asked for an order directing the corporation to issue the new certificate and "for such other orders, judgments and relief as may come to be suitable and proper . . ."

The corporation's answer denied that Hertz was the owner of the 150 shares of stock or that he was in a position to transfer title thereto. (The answer set forth other defenses which will be considered later.) After the pleadings were closed, the corporation filed a suggestion of lack of jurisdiction. The district court held that its jurisdiction was proper.[1]

On this appeal, the corporation renews the jurisdictional objection, contending that the relief sought by the plaintiffs was in the nature of an original writ of mandamus and that a federal district court has no jurisdiction to issue writs of mandamus except in aid of its jurisdiction independently acquired.

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[1] There are two reported district court decisions in this case. One at 105 F. Supp. 200 (1952) discusses jurisdiction; another at 102 F. Supp. 689 (1952) deals with the indispensable party issue discussed later in this opinion. The decision on the merits and the final order are not reported.

The Supreme Court long ago decided that the grant of authority to the federal courts by Congress to hear suits at common law or at equity did not include authority to issue an original writ of mandamus, but that a federal court could issue the writ in aid of its proper jurisdiction to hear suits at law or in equity. McIntire v. Wood, 7 Cranch 504 (1813); Rosenbaum v. Bauer, 120 U. S. 450 (1887). Covington Bridge Co. v. Hager, 203 U. S. 109 (1906). Assuming without deciding, that the requested order directing the corporation to issue a new certificate was a writ of mandamus,[2] the issuance of the writ here

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[2] Whether or not the order is mandamus is immaterial since we hold that the issuance of the order was in aid of the court's jurisdiction to try title to the stock. However, even if title to stock were not in issue, the district court had jurisdiction to issue the order. Under Pennsylvania law a shareholder has the substantive right to have his stock transferred on the corporation's books and to have a new certificate issued. Mandamus is available to him by statute. (If, however, title is at all doubtful, mandamus will not lie. Leff v. N. Kaufman's Inc., 342 Pa. 342, 20 A. 2d 786 (1941)). Many states consider an action in equity proper to compel the transfer of stock and the issuance of a new certificate. 12 Fletcher, Cyclopedia, Corporations Sec. 5519 (1932). Pomeroy says, "... it is well settled that ... equity has jurisdiction to compel the corporation to make the transfer and issue new certificates ..." 4 Pomeroy, Equity Jurisprudence Sec. 1412 (5th ed. 1941). The federal courts have recognized that equity has this power. National Bank v. Watsontown Bank, 105 U. S. 217 (1881). The appellant corporation argues that since Pennsylvania's remedy is mandamus, the federal court is limited to that remedy. However, a federal court can enforce a state-created substantive right and fashion its own remedy, especially where the result would be substantially the same as in a state proceeding. Federal remedies are not limited or af-

was clearly in aid of the court's proper jurisdiction to hear a case or controversy in equity. The plaintiffs alleged that title to the stock was in Hertz and requested all appropriate relief. In view of the defendant's denial of Hertz's title, it was proper for the district court to treat the case as one in which a determination of title to stock was requested. [3]

The next question raised by the corporation is whether a determination made by a Pennsylvania state court six years prior to the present decision, that Hertz was not the sole owner of the 150 shares of stock, was res judicata, precluding a decision by the federal district court that Hertz was the owner of the stock.

Hertz purchased the corporation's stock in 1946 and was issued a stock certificate in his own name. Subsequent to the purchase, he made a demand upon the corporation for his right to inspect certain corporate books and records. The corporation refused to permit the inspection, whereupon Hertz, in early 1947, brought an action in the Court of Common Pleas of Erie County, Pennsylvania,

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fected by state law. See Guaranty Trust Co. v. York, 326 U. S. 99, 106 (1945); Black & Yates, Inc. v. Mahogany Assn, Inc., 129 F. 2d 227 (C.A. 3, 1942), cert. denied, 317 U. S. 672 (1942).

[3] We are told by appellant corporation that Hertz and Horvitz asked for a writ of mandamus and not a declaratory judgment as to title to the stock. Hertz and Horvitz did not label their claim and were not required to do so. They asked for all appropriate relief, and the trial judge treated this as a request to determine title to stock. The defendant corporation was aware from the beginning that the complaint would be so treated and were not thereby prejudiced.

requesting that the corporation be directed to permit him to inspect the books and records. The jury rendered a verdict for the defendant, and, in response to specific questions from the judge, answered that the plaintiff was not the sole and absolute owner of the stock in his own right and that the requested inspection of the corporation's books was for an improper purpose.

Assuming that the specific determinations made by the jury are res judicata between Hertz and the corporation, the only relevant determination was that on January 21, 1948, Hertz was not the sole owner of the stock in his own right. That which the district court decided was that Hertz was the sole owner of the stock on June 1, 1949. These two determinations are not inconsistent. The issue decided in the state court was not the same issue decided in the district court, and thus the principles of res judicata are not applicable.

The corporation points out that under Pennsylvania law there is a presumption that a status or relationship once shown to exist is presumed to continue in the absence of evidence to the contrary.[4] This presumption of law however, disappears when contrary evidence of the fact in issue is introduced. See Morse Boulger Destructor Co. v. Arnoni, 376 Pa. 57, 101 A. 2d 705 (1954); 9 Wigmore Evidence Sec. 2491 (3d ed. 1940). In the present case, the evidence presented was sufficient to warrant a finding that Hertz was the sole owner of the stock on June 1, 1949, and on that date transferred that ownership to Horvitz.

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[4] In this case the presumption is very weak at best because of the lapse of time and the nature and character of the property.

The last point raised on this appeal by the corporation is that the district court should have dismissed the complaint because indispensable parties were lacking, for Pennsylvania law requires that share certificates be signed by the President and Secretary or by such officers as the by-laws may provide. The district court's order was made against the defendant corporation. Even if, in a suit in a Pennsylvania court, such officers are indispensable as a procedural requirement, they are not necessarily indispensable in a federal court. In a diversity case, state substantive law will govern in determining the rights and interests of all concerned. After those rights and interests have been ascertained by state law, a federal court will determine indispensability of a party according to its own rules, taking into consideration whether justice can be done and complete relief afforded. This will depend, of course, on the substantive rights created by the state. In this case, the corporate officers have no personal interest or substantive right which is affected by a district court's order, nor were they necessary to afford the plaintiffs complete and adequate relief. That they will be required to sign the certificate, a purely ministerial act, does not make them indispensable. See Kroese v. General Castings Corp., 179 F. 2d 760 (C.A. 3, 1950); 3 Ohlinger's Federal Practice, 355, et seq. (1948).

For the foregoing reasons, the judgment of the district court will be affirmed.

A true copy:
Teste:

Clerk of the United States Court
of Appeals for the Third Circuit.